IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11276 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AMBESHWAR PAPER MILLS LTD.

Versus

GUJARAT ELECTRICITY BOARD

Appearance:

MR TUSHAR MEHTA for the Petitioner.

MS LILU K BHAYA for the Respondents.

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 23/09/2002

C.A.V. JUDGMENT

1. By filing this petition under Article 226 of the Constitution of India, the petitioner-Company has challenged the order dated 25th October, 2001, passed by the Appellate Committee of the Gujarat Electricity Board,

respondent No.1 herein, in Appeal No.A-82/2001. By the impugned order, the Appellate Committee has partly allowed the Appeal of the present petitioner and the said order of the Appellate Committee is the subject matter of challenge in this petition.

2. The petitioner is a Limited Company and is a high tension consumer of the Gujarat Electricity Board, having its contract demand of 2000 KVA. On 2.5.2001, on behalf of the respondents, a Trivecto meter was installed at the electricity installation of the petitioner. The electricity installation of the petitioner was thereafter checked by the Industrial Checking Squad, which is specially constituted by the Board for the purpose of detection of theft and pilferage of electricity energy. Initially, the checking squad of the Board inspected the premises of the petitioner-Company and at that time, no irregularity was found. On 9.9.2001, in the early morning, at about 5.00 a.m., the Vigilance Checking Squad of the respondent-Board checked the electricity installation of the petitioner-Company. A detailed inspection was carried out at that time. Subsequently, on 13th September, 2001, the Executive Engineer, (Industrial Division), respondent No.2, disconnected the electricity supply and removed the meter and prepared a Panchnama and, subsequently, supplementary bill for a sum of Rs.9,70,80,525.35 ps. was served to the Company. The petitioner thereafter preferred an appeal before the Appellate Committee. The Appellate Committee, after hearing the petitioner as well as the Officers of the Board, partly allowed the said appeal of the petitioner. So far as the theft of electricity energy is concerned, the Appellate Committee found that the petitioner has committed such theft / pilferage of electricity energy. However, the Appellate Committee reduced the amount to Rs.3,56,58,263.05 Ps. Initially, at the time when the petitioner was served with a supplementary bill of Rs.9,70,80,525.35 ps., the petitioner challenged the said bill by way of filing a civil suit, being Special Civil Suit No.214 of 2001, for a declaration that the action of the Board in issuing the said bill is illegal and null and void. The petitioner also prayed for an interim injunction against disconnection. The trial court rejected the application Exhibit 5 by its order dated 9th October, 2001. At the time of deciding the application for interim injunction at Exhibit 5, the trial court held that there was no prima facie case at all in favour of the plaintiff and that the balance of convenience was also not in favour of the plaintiff. Subsequently, in view of the order of the Appellate Committee, which was passed on 25th October, 2001, the said suit was withdrawn

and, ultimately, the order of the Appellate Committee is challenged in the present Special Civil Application.

3. The petitioner has challenged the aforesaid order of the Appellate Committee on various grounds and has annexed voluminous documentary evidence along with the petition.

It is contended on behalf of the petitioner that the order of the appellate Committee, by which it is found that the petitioner is guilty of theft of electricity energy is not in accordance with law and that there is no reliable evidence for coming to the conclusion that the petitioner is guilty of committing theft of electricity energy. In order to substantiate the aforesaid contention, heavy reliance is placed on the earlier inspection carried out by the Officers of the Board, as, on the earlier occasion, during inspection, nothing objectionable was found. So far as the finding about theft is concerned, it is submitted by the petitioner that it is a case of "No Evidence" worth the name. Accordingly, it is prayed that the finding of fact about theft is perverse and is required to be set aside by this Court. It is also the say of the petitioner that the finding of theft is arrived at without getting the meter tested in any laboratory, either before alleging theft or at the time of raising the supplementary bill.

It is, alternatively, submitted that assuming that the allegation of theft is proved, then also, the computation of amount arrived at by the Appellate Committee is not correct and statutory formula is not taken into account for calculating the quantum. It is also, therefore, argued that the said computation is illegal, and, as such, the petitioner is not required to pay any additional amount. On behalf of the petitioner, it is also further submitted that within a period of six months, the electricity connection of the petitioner was checked by the Inspecting Squad and at that time, everything was found to be in order. In that view of the matter, for the period, during which the electricity connection was found to be in order, no revised bill could have been issued. It is submitted that simply because during the last six months, no supplementary bill is issued to the petitioner, is no ground for sending supplementary bill for the aforesaid period of six months, especially when at the time of earlier checking, everything was found to be in order. The Constitutional validity of Condition No.34 is also challenged by the petitioner on various grounds. The petitioner has also challenged the order of the Appellate Committee on the

ground that various documents in connection with the connected load was not taken into account and that the Appellate Committee has not considered the various documentary evidence produced by the petitioner which was in connection with the connected load and under these circumstances, the order of the Appellate Committee is required to be set aside. On these and other grounds canvassed at the time of hearing of the petition, the petitioner has challenged the order of the Appellate Committee, by which the Appellate Committee has confirmed the finding of theft and passed an order of issuing revised supplementary bill to the extent of Rs.3,56,58,263.05 Ps.

4. The petition is resisted by the Board on various grounds. On behalf of the Board, it is submitted that so far as the question about theft is concerned, a detailed checking was carried out on the relevant day and that inspection by special squad was carried out, as, in order to find out the theft of electricity energy, a scientific investigation and inspection was required to be carried out, as, looking to the nature of theft, it is clear that a sophisticated device was utilised by the petitioner-consumer and during the minute checking from all angles, it was noticed that, in a particular manner, the petitioner was committing theft of electricity energy. This aspect about the nature of theft of electricity energy or pilferage of energy is tried to be demonstrated by the Board by placing reliance on certain special type of mechanism adopted by the petitioner, to which I will refer later on.

5. On behalf of the Board, it is submitted that since the petitioner has already withdrawn the civil suit, this petition is not maintainable. It is also submitted that, on an earlier occasion, there was no thorough checking and considering the way in which the theft of energy is committed by the petitioner, it was not possible to find out the same by merely looking at the meter, etc. In the argument of Ms. Bhaya, when a detailed investigation was made on the relevant day, the method of committing theft of energy was noticed by the Board. It is submitted that the finding about electricity theft is a finding of fact, based on rational material on record and, therefore, the same is not required to be interfered with by this Court in a petition filed under Article 226 of the Constitution of India. On behalf of the Board, it is submitted that under the Rules and Condition No.34, the Board is entitled to conduct checking for a period of last six months, as it can be presumed that during the six months,

the consumer might have committed such type of illegalities. It is submitted that during the last six months, no supplementary bill was issued to the petitioner and, therefore, it was open for the Board to issue supplementary bill for a period of six months. It is submitted that Condition No.34 is rational and the same cannot be attacked on the ground that the same is arbitrary, or unreasonable, in any manner.

She had also further argued that the petitioner had never seriously contended the theft aspect before the appellate committee nor the same is highlighted even in the appeal memo and mainly the matter was argued before the appellate committee regarding the computation of M x H x C factor. For that purpose, Ms.Bhaya has also relied upon the written submissions submitted by the petitioner at the time of hearing of the appeal before the Appellate Committee.

On behalf of the Board, it is also further submitted that the Appellate Committee has given considerable relief to the petitioner and the quantum of bill is substantially reduced and that the Committee has considered all the necessary evidence on record for fixing the quantum of supplementary bill. It is also submitted that the petitioner, in fact, had agreed to pay the amount as per the order of the Appellate Committee and, therefore, also this petition is not required to be entertained.

However, so far as the last submission about the so-called agreement on the part of the petitioner to pay the amount as per the order of the Appellate Committee is concerned, Mr.Mehta has pointed out that the petitioner had asked for instalments for paying the said amount. However, the petitioner had clearly mentioned to the authority that it will pay the said amount subject to its rights and contentions to take appropriate proceedings challenging the order in question.

6. On 5.12.2001, this Court (Coram : Ravi R. Tripathi, J.), at the time of admitting the matter, directed the Board not to disconnect the electricity supply without prior permission of this Court, if the same is not disconnected by then.

On 11.1.2002, this Court (Coram : M.S. Shah, J.) has passed the following order :-

" ... ...

> Having heard the learned counsel for the parties for some time, the further hearing of the petition is adjourned to 4th March, 2002. In the meantime, rejoinder affidavit, if any, shall be filed on or before 28.1.2002. Sur-rejoinder, if any, shall be filed on or before 18.2.2002. Ad interim relief granted earlier shall continue till 4.3.2002 subject to the following modification :-
>
> The petitioner shall pay the respondent - Board without prejudice to its rights and contentions in this petition, a sum of Rs.60 lacs in three fortnightly installments of Rs.20 lacs each, that is to say, the first installment of Rs.20 lacs shall be paid on or before 31.1.2002, the second instalment on or before 15.2.2002 and the third installment on or before 28.2.2002.
>
> The Court may take up the petition for hearing on 4.3.2002 for final disposal.
>
> ... ..."

7. It is not in dispute that, subsequently, the petitioner has already paid the aforesaid amount, as ordered by this Court on the aforesaid date. On 9th May, 2002, at the time of adjourning this matter, I had also directed the petitioner to deposit additional amount of Rs.40,00,000/- and the petitioner has also subsequently deposited the aforesaid amount. By this time, the petitioner has deposited, approximately, Rs.2/- crores.

8. The matter was argued by the Advocates on both the sides at great length and they have relied upon various documents and there is voluminous documentary evidence on record. Both the Counsels have also given summary of their submissions in writing.

9. The principal question which is required to be considered in this petition is whether the decision of the Board, to the effect that the petitioner has committed theft of electricity energy, is just and proper in the facts and circumstances of the case, and if that

be so, whether the appellate authority was justified in passing an order of issuance of revised bill to the tune of Rs.3,56,58,263.05 Ps.

10. So far as the first question about theft of electricity energy is concerned, it is required to be found out as to on what material the authority of the Board has come to the conclusion about the said aspect of electricity theft.

On behalf of the petitioner, it is submitted by Mr.Mehta that there is no evidence for coming to the conclusion that the theft of electricity is committed by the petitioner. It is submitted by Mr.Mehta that the finding about theft is based on surmises and conjectures. It is submitted that it cannot be said that the petitioner has dishonestly used or abstracted or maliciously wasted or diverted energy. It is submitted that the allegation of theft is a serious allegation and, therefore, the same is required to be examined in greater detail. It is also argued that the Appellate Committee has also not enquired whether the meter is tested or not.

11. At this stage, it is required to be found out as to what irregularities were alleged to have been noticed by the Checking Squad, comprising of the Vigilance Staff of the Head Office, on the relevant day, i.e. 9.9.2001. The Officers collected the meter data with the help of lap-top computer. Data and shift-wise plant operation log sheet, which also records electrical maintenance and failure in each shift, were collected after due certification by the In-charge Assistant Engineer. Duly signed system-wise summary was also submitted by the In-charge Engineer of the Company. Ultimately, the same was subjected to some further scrutiny and it was found that theft of electricity energy was committed by the consumer. Accordingly, the consumer was booked for theft of electricity energy and subsequently, connection was disconnected on 13.9.2001. The MRI data was available and from the study of the same, it was clear that the consumer has committed theft.

The Appellate Committee has also considered the question of theft in detail and it was found that in view of external diversion, created through 'C' shaped hooks provided on the R & B Phase on CTPT wires, an imbalanced condition was recorded and when disturbance is created in both the phases simultaneously, imbalanced condition was not recorded. It is also found that the appellant has carried out maintenance of HT line, CTPT Units, jumpers, bindings, etc. of their own, which they were not

supposed to do and the same is the responsibility of the Board. The Board found that the connected load was of 5278.71 H.P. and the relevant data was taken from the laptop computer.

Inspection of CTPT was also done through Windows and details regarding running of machine with all the three shifts were collected and that the checking sheet was signed by the representative of the Company without any protest. It was found that joint inspection was also carried out on 9.9.2001 at 9.00 a.m. and data was collected from the laptop computer. In the report, it was found that on both R & B Phases, on CTPT, 'C' shaped hooks were observed. On 'R' Phase, distance between 'C' shaped hooks was 2 ft. and on 'B' Phase, 6 ft. The GEB personnel have collected the data, indicating running of machines in all the three shifts and after making Panchnama, the electricity connection was disconnected on 13.9.2001. It is found from the record that from the very next date of installation of new meter, i.e. from 3.5.2001, total 26 events of current imbalance have been recorded upto 30.7.2001. At some instances, even though plant was running in full swing, meter has recorded higher imbalance of current. It is found that this is impossible for the plant of such a huge capacity of load. It is also found that on certain events, when the plants were running on full load capacity, maximum demand recorded in the meter is substantially lower than average actual consumption. After considering the G-7 Card, the Appellate Committee found that even though 12.8.2001 and 15.8.2001 were recorded as public holidays, on going through the record, it is found that the plants were running in full capacity in all the three shifts on both these days. Even load graph indicates very low reading. It is also found that the readings entered in the G-7 Card are manipulated.

As observed earlier, the contention of the Board is that this is a very sophisticated type of device adopted by the petitioner and, therefore, a scientific investigation and inspection was required by the Board to find out whether proper electricity consumption is recorded.

12. Considering the reasoning of the appellate committee on this aspect, as well as considering the documentary evidence and considering the argument of Ms.Bhaya, I am of the opinion that the finding of fact recorded by the Appellate Committee, by which the consumer is found to have committed an act of theft of electricity energy, cannot be said to be an illegal finding in any manner.

It cannot be said that there is absolutely no evidence worth the name for coming to the conclusion about the theft of electricity energy. It is, no doubt, true that on an earlier occasion, some inspections were carried out by the Board through its local Officers, but, as rightly pointed out by Ms. Bhaya, at that time, such rigorous test was not carried out, as, looking to the nature of device adopted by the Petitioner, it was impossible for the Officers, who carried out the inspection at the earlier stage, to find out the nature of device adopted by the petitioner for the purpose of committing theft of electricity energy. Looking to the nature of device adopted by the petitioner, it was impossible for the inspecting party by mere glance at the meter to find out the theft of electricity energy. Merely looking at the meter or by checking the meter, it is not possible to find out the theft of electricity energy in view of the device adopted by the petitioner. This is not a case wherein theft is alleged on the ground of playing mischief with the meter in any manner. Under these circumstances, it is not possible for me to accept the say of Mr.Mehta that the finding of fact about theft is based on "No Evidence" or that the same is perverse. Ms.Bhaya amply demonstrated as to how the device was adopted by the petitioner to see that appropriate consumption is not recorded and as to how G-7 Cards are manipulated and that by resorting to the device of some external diversion created through 'C' shaped hooks provided on R & B Phase on CTPT wires, the consumer was committing theft of electricity energy. The Board has ultimately been able to find out this type of device adopted by the petitioner by putting in great labour. Even if during checking, nothing objectionable was found with respect to the meter in question, CTPT Unit and their seals, it is clear that a clever device was adopted by the petitioner so far as 'C' shaped hooks provided on overhead conductors of R & B Phase are concerned.

Mr.Mehta, however, has relied upon various case law on the ground that in case the finding is based on "No Evidence", this Court can interfere with such finding of fact and that if the Tribunal has committed a manifest error by misconstruing the documentary evidence or any other material on record, or if it has reached a conclusion, which no reasonable man would reach, or if any relevant material is overlooked, this Court would be justified in interfering with the finding of the inferior Tribunal. So far as the proposition of law canvassed by Mr.Mehta is concerned, there cannot be any dispute at all. However, in the instant case, in my view, it cannot be said that the finding arrived at by the appellate

committee is absolutely based on "No Evidence". Even on the basis of circumstances, such finding can be arrived at by the domestic Tribunal or Authority. As pointed out earlier, in the instant case, there is a very sophisticated technological device, and the manner and method which is adopted by the petitioner is such that it could not have been noticed during the earlier inspection and thereafter, considering the necessary circumstances and after considering the matter from various angles for the purpose of finding out the theft of electricity energy, in my view, the finding arrived at by the authority can never be said to be arbitrary in any manner. Even if there is some evidence for coming to such a conclusion, this Court will not disturb such finding.

13. Mr.Mehta has, however, relied on the judgment of the Apex Court in M.P.E.B. and others v. Smt. Basantibai, AIR 1988 SC 71. However, the said decision was in connection with faulty meter. The Supreme Court, after considering the provisions of Section 26(6) of the Electricity Act, came to the conclusion that whether a meter is correct or faulty is a question which is required to be decided by the Electrical Inspector. But, so far as the present case is concerned, the matter required to be considered is whether by a particular device, the petitioner has committed theft of electricity energy. This is not a case in which any defect is found in the meter in any manner. In my view, the Board was justified in raising the presumption of theft against the consumer on the basis of the material available on record. After technical scrutiny and study of the installation as well as the record submitted by the petitioner, if the authority has come to the conclusion that there was a conclusive evidence that theft of electricity energy was committed by the consumer and when the said decision is based on rational material, the finding of theft is not required to be interfered with by this Court. Even if that part of the evidence is required to be re-appreciated as if I am deciding an appeal, then also, it is not possible for me to take a different view than the one taken by the Appellate Committee of the Board. The argument of Mr.Mehta that the petitioner has not committed theft of electricity energy cannot be accepted and hence, the same is rejected.

14. In fact, the Officers of the Board has taken great labour and pains in finding out the aforesaid device adopted by the petitioner and great labour has been put in by the Officers of the Board, who visited the

factory on the relevant day, i.e., on 9.9.2001. The petitioner has adopted a very clever device by adjusting the plant's unit in different days with a view to see that by such adjustment, such theft may not be noticed by the authority. I find considerable substance in the argument of Ms. Bhaya that the petitioner has tried to adjust the plant's units in such a manner that by such adjustment, one may not be able to notice that the petitioner has actually committed theft of electricity energy.

15. Even in his appeal memo submitted before the Board, the petitioner has more or less highlighted other factors about quantum of supplementary bill. The petitioner has not led any satisfactory evidence or material before the Appellate Committee to prove his innocence nor has he led any evidence to show that the material on which the Board has relied for reaching the said conclusion is, in any way, incorrect.

16. Mr.Mehta thereafter has vehemently argued that the theft bill is required to be calculated as per the formula M x H x C, which is contained in Condition No.34 of the Conditions framed by the Board. The respondent-Board has framed various Conditions for supply of Electrical Energy. Condition No.33 provides about Malpractice and Theft of Energy and Condition No.34 provides for payment for energy dishonestly used or abstracted or maliciously wasted or diverted. The method of computing period of assessment is also provided under Condition 34 and the same reads as under :-

> " ... ...
>
> 34. Payment for energy dishonestly used or abstracted or maliciously wasted or diverted.
>
> xxx xxx xxx
>
> PERIOD OF ASSESSMENT :
>
> The assessment of energy under this Clause 34 shall apply on the following basis :
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> 1. Past six months from the date of detection, (for seasonal industries - Six working months, excluding off season period declared by the consumer); or

2. Actual period from the date of commencement of supply upto the date of detection; or

3. Actual period from the date of replacement of component of metering system in which evidence is detected within six months from the date of detection and upto the date of detection; or

4. The actual period from the date of the previous installation Checking (and resulted into supplementary bill) under provisions of this clause within six months period of the date of the detection under consideration and upto the date of detection.

... ..."

Mr.Mehta submitted that the revised bill was required to be issued to the petitioner only after considering the subsequent period from the date of the previous installation checking and the period prior to such last checking cannot be taken into consideration for the purpose of sending the supplementary bill, especially when in the previous installation checking, nothing objectionable was found. He submitted that simply because everything was found to be in order during previous checking and on that basis, no supplementary bill is issued to the petitioner, is no ground to take the aforesaid period into account, which was already subjected to proper checking for the purpose of sending the revised bill. He submitted that Condition No.34 which provides that unless the previous checking has resulted into supplementary bill, the said period cannot be given set off is illegal and unconstitutional. He further submitted that even if nothing objectionable is found during earlier inspection and, therefore, no supplementary bill is issued, as per the amended Condition No.34, unless previous installation checking has resulted into supplementary bill, the aforesaid period will be taken into account. It is submitted that, in the instant case, the supplementary bill, at the most, could have been issued to the petitioner only from the date of previous installation checking, as, upto that period, i.e. when the previous installation checking was done, everything was found to be in order. He further

submitted that in view of the amended Condition No.34, since such installation checking has not resulted into supplementary bill, unfortunately, no such benefit is available to the petitioner, and, therefore, even though for the earlier period as per the inspection, everything was found to be in order, yet, since no supplementary bill is given, the petitioner is subjected to revised bill, even though, during that period, he had not committed any alleged illegalities. In his submission, as per the above-referred amended condition even if the installation is checked previously for detection of theft and no theft is detected, then also, the bill will have to be issued for past six months. No discretion is given either to the Officers of the Board, who prepare the theft bill, or even to the appellate committee to revise the bill from the date of last theft checking when no theft was found. The said Condition is arbitrary and, therefore, such amended condition is required to be struck down as being unreasonable and discriminatory.

On behalf of the Board, it is submitted by Ms. Bhaya that in view of the Division Bench judgment of this Court in Patel Parshottamdas Vanmalidas v. Gujarat Electricity Board and another, AIR 1987 Gujarat 188, it cannot be said that the said Condition No.34 is arbitrary or is ultra vires in any manner. In the said judgment, a Division Bench of this Court has considered Condition No.34 (prior to its amendment) and it is observed in paragraphs 2 and 3 as under :-

> " ... ...
>
> 2. As regards the contention of absence of procedure for submitting the case of the consumer before the impugned assessment of penalising action is taken, we are not able to appreciate this argument. The consumer with his open eyes enters into an agreement with the Board with such conditions. Those conditions are for the purpose of meeting certain exigencies in granting the service connection. It has also been made clear by the Board in Condition No.3 which is framed under the title "The Gujarat Electricity Board Prevention of Theft of Energy and Malpractices (By Consumers) Regulations, 1976" as follows :-
>
> "3. The Board may, with a view to preventing the consumers from indulging in

committing theft of energy and committing malpractices impose such conditions in its conditions of supply applicable to its consumers and forming part of the Contract of supply between the Board and the consumer as the Board may deem fit."

Thus, it is clear that the Board has formulated such a condition in order to safeguard its interest. Such a condition is there for the purpose of checking, apart from other things, the theft of electricity. It is not a case of any defective meter, but it is a case of theft of electricity by the consumer concerned. As a matter of fact, in this case it is alleged that the petitioner, by inserting a plastic strip, was able to stop the running of the meter and thereby, committed theft of electricity. The condition clearly states as to the procedure that has to be adopted for the purpose of questioning the departmental action in levying penal charges. It has also been made clear in the condition as to the limit to which the Department can go for the purpose of assessing the theft of electricity. In no case the Department can go beyond a period of six months, according to this condition. In Condition No.34, we are able to see that manner of assessment also has been specified. If all these steps are taken by the Department, the condition itself states that the consumer has a remedy by filing an appeal to the appropriate authority within a specified time. Thus, a conjoint reading of this Condition and the purpose for which it is intended, clearly makes out that such a condition is not arbitrary or unreasonable, but within the powers of the Board and, in our opinion, it does not offend any of the Articles of the Constitution. The argument as if the imposition of penal assessment before filing an appeal is harsh and makes the appeal illusory cannot be appreciated. The penal assessment, as we have stated already, is restricted to a limited period. Such an assessment was made after the Department itself was satisfied with regard to the theft of electricity committed by

the consumer concerned. Hence, it cannot be said that the appeal provided under Condition No.34 is an illusory one.

3. We are also not convinced that such a condition provided under Condition No.34, in any way, conflicts with the provisions of the Indian Electricity Act as directly coming into conflict with S.26(6) of the Indian Electricity Act. Section 26(6) reads as follows :

"26. xx xx xx

(6) Where any difference or dispute arises as to whether any meter referred to in sub-sec.(1) is or is not correct, the matter shall be decided, upon the application of either party, by an Electrical Inspector, and where the meter has, in the opinion of such Inspector ceased to be correct, such Inspector shall estimate the amount of the energy supplied to the consumer or the electrical quantity contained in the supply, during such time, not exceeding six months, as the meter shall not, in the opinion of such Inspector, have been correct; but save as aforesaid, the register of the meter shall, in the absence of fraud, be conclusive proof of such amount or quantity :

Provided that before either a licensee or a consumer applies to the Electrical Inspector under this sub-section, he shall give to the other party not less than seven days notice of his intention so to do."

The two decisions cited by the learned counsel appearing for the petitioner in Hamidullah Khan v. Chairman, M.P. Electricity Board reported in AIR 1983 Madh Pra 1 and Basantibai v. M.P. Electricity Board, Indore, reported in AIR 1985 Madh Pra 70, (deal) with defective digit in the meter and a meter which was burnt respectively. As far as the present case is concerned, there is no question of any defective meter as such, but the consumer has dexterously inserted a plastic wire in

> order to stop the meter from running. This is a case, if it is proved, squarely coming under the theft of electricity and will not in any way be construed as one coming under the category of recording consumption under a defective meter. Hence, Condition No.34 does not come into conflict either with the Indian Electricity (Supply) Act or S.26(6) of the Indian Electricity Act as submitted by the learned counsel appearing for the petitioner herein. Taking all these aspects into consideration, we are of the view that Condition No.34 is not unreasonable or arbitrary and it does not offend any of the provisions of the Constitution. For all these reasons, we do not find any substance in this Special Civil Application and accordingly, the same is dismissed.
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> ... ..."

A reference is also required to be made to the decision of the Apex Court in Hyderabad Vanaspathi Ltd. v. A.P. State Electricity Board and others, (1998) 4 SCC 470. In the said judgment, the Supreme Court has also approved the view of the Division Bench of this Court (supra) and it was found that such type of condition was valid. In paragraph 42 of the said judgment, the Apex Court found that the Division Bench of the Gujarat High Court has considered similar condition and upheld the validity thereof and ultimately, the Apex Court agreed with the view taken by this Court.

Mr.Mehta, however, argued that in view of the amendment of Condition No.34, it is clear that unless the previous inspection resulted into supplementary bill, in a given case, even if it is found that everything was in order at the time of earlier inspection, and, therefore, no revised bill is issued, yet, while issuing the revised bill, even the said period, during which even no theft is committed, is also taken into consideration by the Board and, according to him, therefore, in view of this amendment, as indicated in the Condition, now, that part of the condition is arbitrary and ultra vires as even if the consumer is found to be honest and, therefore, no supplementary bill is issued during the intervening period, yet simply because no revised bill is issued, the said period is taken into consideration by the Board.

Considering the reasoning of the Apex Court as well as of the Division Bench of this Court, in my view, condition No.34 cannot be held as arbitrary, discriminatory or ultra vires simply because by amendment it is provided that the assessment of energy will be for the actual period from the date of the previous installation checking (and resulted into supplementary bill) within six months' period of the date of detection under consideration and upto the date of detection. Even otherwise, I am of the opinion that if a consumer is able to satisfy the authority that at the time of previous installation checking, the Checking Squad found everything in order and no electricity theft was noticed in any manner, then, naturally, the said aspect is required to be taken into account by the Board irrespective of whether the same resulted into a supplementary bill. In short, ultimately, if it is established that no irregularity or theft of energy was found at all in any manner, on the previous occasion during the earlier installation checking, naturally, the supplementary bill is required to be issued subsequent to the date of the previous installation checking irrespective of whether it resulted into supplementary bill. Even after issuance of supplementary bill if the consumer is able to establish even before the Appellate Committee that the so-called theft is committed only from a particular date, naturally, if the Appellate Committee, after examining the merits of such contention, comes to the conclusion that even though the supplementary bill is issued for six months, the consumer has committed theft only from a particular date, which may not cover the entire period of six months, naturally, the Appellate Committee can give appropriate relief at the time of determining the quantum of amount, which the consumer is required to pay. It cannot be said that if the previous checking is done in a proper manner and, subsequently after that checking if any illegality or theft of energy is noticed, on same set of facts on which, previously, the Consumer was not found to have committed theft, naturally, he will get the benefit of the same, even though he is not subjected to supplementary bill, naturally because he has not committed theft at that time. It, however, depends on the facts and circumstances of the case and the nature of installation checking at the relevant time and at a subsequent time.

I may clarify that, in a given case, if it is established that in an earlier checking, everything was found to be in order, and on similar facts and evidence, another inspection was carried out, wherein it is found that there is theft of electricity energy, then,

naturally, in such case, the Board has to consider the question about computing the revised bill from the date of such previous checking only.

So far as amended Condition No.34 is concerned, it requires to be considered from the aforesaid angle and if in a given case the consumer is able to satisfy that on the same set of material, previously checking was done in which everything was found to be in order and, subsequently, so-called illegality is committed by him at a subsequent stage, naturally, the earlier installation checking will have its own bearing and in such cases, naturally, the supplementary bill will be required to be issued from the date of such previous installation checking. Condition 34 is required to be considered in the aforesaid light. Under these circumstances, the contention of Mr.Mehta that Condition No.34, which gives no option to the Board but to issue supplementary bill in case the earlier checking has not resulted into supplementary bill, is without any basis. The said contention is accordingly rejected, as Condition No.34 is required to be read in the aforesaid manner and in that view of the matter, the said condition cannot be said to be ultra vires, illegal or unconstitutional in any manner.

17. Mr.Mehta has also relied upon a judgment of another Appellate Committee, wherein it is held that if during the earlier inspection, no illegality was found, the said fact is required to be taken into consideration for issuing the revised bill.

The aforesaid argument is opposed by Ms.Bhaya on the ground that on an earlier occasion, inspection was carried out only for the purpose of checking meter and she submitted that on 25.7.2001, installation was checked mainly for the accuracy of the metering system and it was ultimately found to be satisfactory. The installation checking was carried out mainly for the accuracy of the metering system and it was found satisfactory. It is submitted that on both the aforesaid occasions, checking was carried out in the presence of the representative of the consumer. Considering the nature of theft alleged against the petitioner and considering the nature of inspection carried out by the Special Squad on the relevant day, i.e. on 9.9.2001, in my view, it cannot be said that on the earlier occasion, similar type of rigorous checking, which was done on 9.9.2001, was carried out. As pointed out earlier, merely by checking the meter, the way in which the irregularity was

committed could never have been detected by checking the meter. It would have been a different matter, if on the subsequent date, i.e. on 9th September, 2001, if the checking was done and if it was noticed that there was no tampering with the meter, then, naturally, the previous checking, wherein nothing objectionable was found, would assume some importance. In the instant case, therefore, since the nature of electricity theft was found out during checking on 9th September, 1991, the previous inspection, wherein the meter was found to be intact, will have no bearing whatsoever. On both the occasions, different type of detections were carried out by the Board. Under these circumstances, the contention of Mr.Mehta cannot be accepted that simply because, on earlier inspection, nothing objectionable was found and since everything was found to be in order, the revised bill was required to be issued only for the subsequent period from the date of earlier inspection.

18. Mr.Mehta, therafter, vehemently argued the matter on the point of quantum of the amount fixed by the Appellate Committee. Mr.Mehta submitted that the Appellate Committee has not properly considered M x H x C factor. So far as the argument about "M" factor is concerned, Mr.Mehta submitted that the petitioner being a High Tension Consumer, the assessment of supplementary bill is required to be made as per the formula provided in Condition No.34 and it is submitted that while calculating the above formula, the following parameters are required to be kept in mind :-

Contract Demand = permissible load available at the installation of a consumer (2000 KVA in the instant case).

Connected load = Actual load connected at the time of checking (which is to be physically verified by the Checking Squad).

Calculation of Factor "M"

"M" is Contract Demand in KW - or - 75% of Connected Load whichever is higher.

Demand in KW = Contract Demand (KVA) X Power Factor.

= 2000 X 0.969
= 1938 KW

Actual calculation of connected Load to arrive at 75%

= Actual connected load X 0.75
= 2893.61 X 0.75
= 1618 KW

Since out of 1938 KW and 1618 KW, 1938 KW is higher, Factor "M" will be 1938 KW.

It is submitted that as per the Conditions of Supply, the parameter "M" will be contract demand in KW or 75% of the connected load in KW, whichever is higher. For the purpose of deriving the said parameter "M", it is incumbent upon the Board to calculate and count the actual load on each system on the date of checking found connected. It is submitted that on the relevant date of checking, i.e. on 9.9.2001, the Officers of the Board never counted the connected load physically by visiting the factory premises. The Officers of the Board have not bothered to calculate the actual connected load on the date of checking and merely based upon the connected load recorded in the record of the Company some 10 years back, the assessment of the supplementary bill was made. After the counting of the connected load, which was never physically verified at all, the Officers of the Board have adopted what was shown in the file of the Company, showing particular connected load which was recorded 10 years back. It is submitted that the Officers of the Board are under an obligation to hold summary enquiry before making the assessment and that the said point was also elaborately taken in the appeal memo itself in tabular form. It is submitted that if the Officers of the Board had cared to take pains to count the actual load by physical verification of each system, they would not have found connected load more than 2893.61 HP. It is submitted that the petitioner has placed before the Appellate Committee the electric load of one such system after the modification of the plant. It is submitted that the Board has arbitrarily taken 5278.71 HP to be the connected load allegedly found at the time of checking, though no physical verification was made on the relevant day and emphasis is placed on the aspect of not physically verifying the connected load and it is argued that it is the duty on the part of the Officers of the Board to physically verify the connected load. According to Mr.Mehta, total connected load of the consumer is required to be taken into consideration at the time of inspection. It is also pointed out that out of the four systems, which were installed years back, the GPCB has refused the consent for three systems and, therefore, the

systems shown at serial Nos. 1, 2 and 3 of the Chart produced at page 122 are totally inoperative since many years. The aforesaid systems were totally in a rusted and deteriorated condition and it should have been presumed that it is not in use at all since long. It is also submitted by Mr.Mehta that the monthly KVA demand recorded during the last few years never crossed 1500 KVA, which justify the petitioner's contention that the connected load should be considered as 2893.61 HP, and cannot be taken as 5278.71 HP.

It is also argued that there is documentary evidence on record to show that some of the machineries, which were installed at the time of initial installation of the industry (and which is also calculated at the time of preparing the Bill) are, in fact, sold and the amount is realised which is credited in the Bank account of the petitioner.

It is also submitted that after the installation of the plant 10 years back, the petitioner-Company has carried out the energy audit and total of 559.5 HP load is even disconnected from the distributing mains itself long back. It is submitted that these contentions are not considered by the Appellate Committee and the same are very cryptically dealt with. It is argued that, accordingly, the Board is required to be directed to revise the bill, calculating Factor "M" to be 1938 KW.

So far as "H" factor is concerned, it is argued that the new meter itself was installed on 2.5.2001 and in view of the full-fledged checking on 25.7.2001, which was not a routine checking, when everything was found to be in order, the theft bill was required to be prepared at the most from 25.7.2001, pursuant to the detection of alleged theft after the inspection which was carried out on 9.9.2001. It was also submitted that when another theft checking squad visited the installation on 9.9.2001, most of the Officers were the same and the very same officers were also part of the squad which came for checking on 25.7.2001. It is submitted that if the theft bill is prepared from 2.5.2001, the number of days will be 130 days and if the theft bill is prepared from 25.7.2001, the number of days will be 46 days. It is submitted that the Appellate Committee has not properly considered the question about chargeable days. It is submitted that the Appellate Committee has not considered as to whether the bill should be prepared with effect from 25th July, 2001 or 2nd May, 2001. According to the petitioner, these contentions are not at all dealt with by the Appellate Committee.

So far as 'C' Factor is concerned, it is submitted that for determining 'C' Factor, the Appellate Committee always counts average consumption of any past six months, in which maximum consumption is recorded. It is submitted that the maximum consumption was recorded in the past between November, 1997 and April, 1998, which is a continuous six months' period. The petitioner has also submitted the figure of total consumption for the aforesaid six months' period. It is submitted that, however, in the instant case, the Committee has deviated from this practice. It is submitted that even though the petitioner had cited instances of similar such cases in previous orders passed by the Appellate Committee, the same is not considered by the Appellate Committee. It is submitted that the contention of the petitioner about 'C' Factor has not been taken into account. it is submitted that 'C' Factor has been taken as 0.515. No reasons are given for deviating from its previous orders. It is, therefore, submitted that the Appellate Committee has not properly considered the aforesaid aspect for finding out as to what should be the quantum of supplementary bill. It is submitted by Mr.Mehta that the Appellate Committee, being the Final Authority so far as the question of fact is concerned, is required to consider all the necessary facts and circumstances of the case and the arguments canvassed before it by the consumer. As the finding, which is given after appreciating the factual aspect of the matter, is a finding of fact and the same will determine the fate of the consumer, and when such an important aspect is required to be considered by the Appellate Committee, where a consumer is asked to pay a large amount, naturally, the Appellate Committee is required to consider all the facts, and evidence on record and submissions of the parties are also required to be taken into consideration in a proper manner.

19. Mr.Mehta has relied upon the judgment of this Court in Shamji Ramji Gohil v. Deputy Engineer (O&M), Gujarat Electricity Board and others, AIR 2001 Gujarat 56. Reliance is placed on paragraph 7, which reads as under :-

> " ... ...
>
> 7. Regarding machinery, however, from the evidence, it appears that some machinery was bought by the petitioner and was brought in March / April 1996. There is material on record which, Mr.Bhaya states, was placed before the appellate committee.

> Though all these documents were before the appellate committee, they have not been considered by the committee in proper perspective. In the order of the appellate committee, it was observed that machinery was installed in June, 1996. In these circumstances, in my opinion, to that extent, the order is vulnerable and deserves to be set aside, by directing the appellate authority to decide the appeal afresh in accordance with law.
>
> ... ..."

Under the circumstances, it is submitted that since the aforesaid aspect has not been properly considered by the Appellate Committee, the Court may set aside the revised bill issued to the petitioner on the basis of the judgment of the Appellate Committee, or, in the alternative, the matter may be sent back to the Appellate Committee for deciding the aforesaid matter.

So far as the aforesaid arguments are concerned, Ms.Bhaya, for the Board, submitted that at the time of checking on the relevant day, the Officer of the Company one Mr.Chavda had admitted that the connected load is 5278.71 H.P. and particulars of the same are also given by the said Mr.Chavda. It is submitted that in view of the statement of Mr.Chavda, coupled with the documentary evidence submitted by the Company itself, there is no substance in the argument of Mr.Mehta as regards the connected load. It is submitted that since the documentary evidence was available and when the Officer of the Company itself admitted the said fact, it was not necessary to make any physical verification.

Ms.Bhaya has also relied on page 189 of the compilation, which is a computerised copy of the connected load, signed by the Engineer of the Company. It is submitted that, on the date of inspection, the said document dated 11.6.2001 was made available to the inspecting party. Ms.Bhaya, therefore, laid heavy reliance on the document at page 189 of the compilation. It is submitted that in that view of the matter, there is hardly any substance in the argument of Mr.Mehta. It is also submitted by her that as per Condition 15, if the load factor is reduced, the same is required to be informed to the Board, which is not being done. She has also relied upon the Joint Inspection Report at page 183, which was prepared on the very day.

She also further argued that the Board has also published salient features about the amended Condition Nos. 34 and 35 and as per the same, it is observed in paragraph 4 as under :-

" ... ...

4.0 In some cases it happens that the installation checking was carried out during the period of 6 months (i.e.. period of assessment under consideration). This is being put forward as one of the point of defence to restrict assessment up to that date. Such installation checking, it is observed, was not many a time intended to detect theft but may be for other technical consideration. It is also observed that though the installation is checked the modus operandi of theft is such that it would not have been found out during normal installation checking.

In the amended provision it is now provided that, if as a result of installation checking a supplementary bill is issued for theft under this condition and if the date of such checking is falling within the period of assessment under consideration (six months) then the present assessment will be restricted from that date to the date of detection to the date of present detection. The other inspection / checking are not to be considered.

... ..."

She further submitted that all the aforesaid three aspects have been considered properly by the Board. She further submitted that so far as the argument about production of some additional document is concerned, the same was also properly considered by the Appellate Committee. She also submits that simply because there may be a direction from the Gujarat Pollution Control

Board, that itself is not enough to come to the conclusion that the said machineries were not used by the petitioner-Company.

She has also submitted that so far as change of meter is concerned, that has no connection with the issue in question, because, here, in view of the particular type of device adopted by the petitioner in the system itself, the change of meter has no relevance for determining the period of assessment.

So far as the aforesaid aspect is concerned, both the sides have argued the matter at great length. However, so far as the Appellate Committee is concerned, as submitted by Mr.Mehta, it is assigned with a very important duty, because whatever may be the finding of fact, which is arrived at by the Appellate Committee, after considering the relevant material on record, the same cannot be brushed aside lightly, and such finding, based on consideration of appropriate material on record, cannot be disturbed by this Court while exercising its jurisdiction under Article 226 / 227 of the Constitution of India. However, the said finding of fact is required to be reached after considering the arguments and documentary evidence on record.

Ms.Bhaya, no doubt, tried to justify the decision of the Appellate Committee on the aforesaid aspect of M x H x C factor that on the basis of the data supplied by the Company itself, the Appellate Committee has acted for coming to a particular conclusion.

So far as the argument of Mr.Mehta regarding connected load and other factors are concerned, it is not for this Court to consider the same, as it is within the domain of the Appellate Committee to consider the same. Though the argument of Ms.Bhaya, that there is an admission on the part of the Company itself by submitting document so far as connected load is concerned, is prima facie attractive, in my view, the said aspect as well as the aspect about documentary evidence about sale of certain machineries as well as the question about the effect of the order of the Gujarat Pollution Control Board as well as the point whether the petitioner has still carried out the business in spite of the order of the Gujarat Pollution Control Board are all questions, which are required to be addressed by the Appellate Committee while deciding the question about quantum of supplementary bill. The Appellate Committee itself is required to consider whether continuous six months'

period is to be taken into consideration for the purpose of determining Factor 'C' on the basis of some other orders passed by the Appellate Committee in this behalf. So far as the aforesaid aspect is concerned, though the same is tried to be justified by the Board by fling affidavit-in-reply and by placing some material on record, in my view, so far as the appellate proceedings are concerned, the Board is also an adversary party, and, therefore, the submission of both the sides and documents of both the sides are required to be dealt with by the Appellate Committee itself. As observed earlier, the Appellate Committee of the Board is vested with very wide powers as the Appellate Committee has to give finding on the question of theft as well as determine the assessment of the revised bill. Therefore, the Appellate Committee has to discharge its duty by considering all the relevant materials and evidence on record as well as by taking into consideration the arguments of parties and the said application is also required to be reflected in the order itself. The petitioner has also pointed out the question about M x H x C factor, in detail, in its representation. While considering the question about quantum of revised bill, the contention raised by the petitioner in its written submissions before the Appellate Committee and as canvassed before this Court, as incorporated above, have not been dealt with, in detail, by the Appellate Committee. There is no satisfactory reasoning so far as M x H x C Factor is concerned, on which very heavy reliance is placed on behalf of the petitioner at the time of hearing of this petition.

So far as the connected load part is concerned, the Appellate Committee has brushed aside the argument of the petitioner by observing that at the time of preparing the checking sheet, no protest was made nor was it stated before the Officers of the Checking Squad that the connected load is wrongly noted in the checking sheet. In my view, the aforesaid aspect may be one of the considerations, but other arguments advanced by the petitioner in this connection are also required to be taken into account. Ultimately, the Appellate Committee may not agree with the submissions, but the arguments canvassed by the petitioner in this behalf are required to be taken into account, and also the fact, whether any other material was available for coming to the conclusion about connected load, is also required to be stated in the order. Documents submitted by the petitioner are also not considered in detail and those documents are also not taken into consideration by observing that they are irrelevant. In my view, the Appellate Committee has not considered, in detail, the submissions made by the

petitioner in its written submissions as regards M x H x C factor. It is, no doubt, true that the Board has tried to justify the decision by submitting the said aspect on merits, but, as observed earlier, ultimately, it is for the Appellate Committee to consider the said aspect in more detail, as, ultimately, the Board, which is assigned with wide powers while deciding the rights of the parties, has to give finding of fact after considering the totality of the evidence on record.

Under these circumstances, it is clear that the documents submitted by the petitioner are very casually dealt with, without giving detailed reasons about the same by the Appellate Committee. In view of the aforesaid aspects of the matter, and considering the fact that the petitioner has submitted detailed arguments before the Appellate Committee, in my view, the matter is required to be sent back to the Appellate Committee for the purpose of considering the question about the chargeable days for the purpose of supplementary bill and for the purpose of considering M x H x C factor again, in the light of the evidence on record. The Appellate Committee is free to take its own decision in this connection after hearing both the sides. However, the Appellate Committee may deal with all the submissions of the petitioner in connection with the aforesaid three factors as well as the submission of the Board in this behalf. Since the arguments are not dealt with, in detail, and justification given by the Board before this Court, in my view, it is not enough in the present case, as, it is for the Appellate Committee to decide all these questions at the time of hearing the appeal. The matter is sent back to the Appellate Committee for giving fresh decision, as indicated above, on the aspect about computation of supplementary bill after considering all the relevant facts. The Appellate Committee will accordingly consider the question of assessment of supplementary bill afresh and while considering the said aspect, the contention of the petitioner, as incorporated above in this decision, may also be taken into consideration and the same may be dealt with after giving proper reasoning, in detail.

Accordingly, so far as the finding of theft recorded by the Appellate Committee is concerned, the submission of the petitioner on the same is rejected and, accordingly, the aforesaid finding arrived at by the Appellate Committee is confirmed. The matter is sent back to the Appellate Committee for reconsideration of the question about computation of supplementary bill and its proper assessment, and the said aspect may be

considered after hearing the petitioner and the respondent and whatever may be the documentary evidence available on the record, the same may be dealt with by the Appellate Committee again and the written submission as well as the arguments advanced by the petitioner herein, as incorporated in this order, also may be taken into account while considering the aforesaid question about computation of supplementary bill. Since this aspect is not dealt with, in detail, and even the documentary evidence of the petitioner is not properly considered, by simply saying that it is irrelevant, the matter is sent back to the Appellate Committee. The Appellate Committee is free to take its own decision after considering the documentary evidence on record and after considering the arguments of both the sides. It is clarified that this Court has not expressed any opinion on the merits of the quantum of supplementary bill in any manner and it is for the Appellate Committee to decide the said question again in the light of the observations made in the order.

Both the sides have relied upon various judgments on other issues. However, since the matter is sent back to the Appellate Committee for reconsideration, it is not necessary to examine all those judgments, in detail.

The matter is sent back to the Appellate Committee for re-deciding the question about the quantum of supplementary bill and at the time of taking fresh decision, as stated above, the arguments canvassed by the petitioner regarding M x H x C factor may be taken into consideration and the documentary evidence produced by the parties also may be dealt with appropriately by incorporating the necessary arguments of both the sides in the order.

Since large amount is involved in the matter and considering the fact that by way of an interim order, the petitioner is protected against disconnection, in the facts and circumstances of the case, the Appellate Committee may dispose of the aforesaid appeal as early as possible, preferably by 30th November, 2002. Mr.Mehta has assured the Court that the petitioner will give full cooperation and may not seek unnecessary adjournments, so that the matter may not be further delayed and the issue can be thrashed out at the earliest.

Ms.Bhaya has also submitted written submissions and on merits, she has tried to justify the order of the Appellate Committee even on the question of quantum of supplementary bill. No doubt, the Board has also tried

to justify the same, by giving plausible explanation. However, in my view, this point is required to be appreciated by the Appellate Committee.

It is, however, clarified that the question about any further amount, if at all it is required to be paid, is required to be determined by the Board only after the fresh decision of the Appellate Committee. Similarly, the question about the ultimate payment will be subject to the fresh decision of the Appellate Committee. It is also clarified that the question of further payment, if any, is required to be determined only after the fresh decision of the Appellate Committee in this behalf. Payment given by the petitioner by virtue of earlier order of this Court as well as of the Appellate Committee and received by the Board, will be subject to the final decision of the Appellate Committee in this behalf one way or the other.

The order of the Appellate Committee is accordingly set aside and it is sent back for re-decision of the question about re-assessment of the amount of revised bill only and, as observed earlier, the question of theft stands concluded by this order. The petition is accordingly partly allowed. Rule is made absolute to the aforesaid extent, with no order as to costs.

September 23, 2002 (P.B. Majmudar, J.)

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(apj)